**MD ALWIN MUSTAPA & ORS**

**v.**

**PP**

HIGH COURT, BRUNEI DARUSSALAM
DENYS ROBERTS CJ
[CRIMINAL REVISION NO: 5 OF 1998]
5 OCTOBER 1998

***CRIMINAL PROCEDURE:*** *Revision - Magistrate's order of discharge amounting to acquittal under s. 186 of Criminal Procedure Code of Brunei - Whether magistrate was functus officio after having made an earlier order of discharge not amounting to an acquittal - Whether dependant on whether earlier order was a judgment*

***CRIMINAL PROCEDURE:*** *Revision - Order of magistrate under s. 186 Criminal Procedure Code of Brunei - Whether a judgment - Whether it could be altered or reviewed - Criminal Procedure Code of Brunei, s. 240*

***CRIMINAL PROCEDURE:*** *Revision - Order of magistrate under s. 186 Criminal Procedure Code of Brunei - Whether order can be conditional*

***WORDS & PHRASES:*** *"judgment" - Definition of*

The magistrate in an earlier order on 17 June 1998, had discharged the defendants not amounting to an acquittal, on the application by the prosecution. In the same order, the magistrate had also arranged for a further mention of the case on 22 July 1998.

The matter was adjourned to 27 July 1998 and the magistrate was informed that the prosecution did not intend to proceed with the charge. On the application of the 3rd defendant, the magistrate made an order ('subsequent order') whereupon the defendants were discharged amounting to an acquittal. The magistrate then submitted the case to the instant court for revision.

The issues before the court were: (1) whether the earlier order by the magistrate was conditional as the magistrate had arranged for a further mention of the case; and (2) whether in view of the earlier order made, the magistrate could make the subsequent order under s. 186 of the Criminal Procedure Code of Brunei ('CPC of Brunei').

**Held:**

**[1]** An order made under s. 186 of the CPC of Brunei must be an order made without conditions. The correct course, in such circumstances, would be for the magistrate to warn the prosecution that, if it was not ready to proceed on a specified date, the magistrate would direct that there be a discharge amounting to an acquittal on that date, or to order a discharge amounting to an acquittal forthwith. If a magistrate issued such a warning, it would be open to the Public Prosecutor to enter a *nolle prosequi*, under s. 377 of the CPC of Brunei. This would not amount to an acquittal, and would enable the prosecution to pursue the charge at a later date if it wished to do so.

**[1a]** A stay under s. 186 of the CPC of Brunei cannot be made conditional and the magistrate was in error for so doing. This was on the assumption that the 3rd defendant was correct in alleging that the earlier order was not accurate as it was conditional, although the record did not show as such.

**[2]** The magistrate could make the two orders under s. 186 of the CPC of Brunei, provided that the earlier order was not a "judgment".

**[3]** On whether an order under s. 186 of the CPC of Brunei can be construed as a "judgment", this depends on the answer to the question of whether the judge can alter or review it. Section 240 of the CPC of Brunei provides that no court, other than the High Court, shall alter or review a judgment, once it has recorded it.

**[4]** There is no definition of "judgment" in the CPC of Brunei. However, the CPC of Brunei contains a number of phrases which suggest that a "judgment" is different from an "order" (see ss. 271, 279, 289, 291, 293, 294). In the absence of any definition of "judgment", it is assumed that it has a meaning different from that of an "order". Section 240 of the CPC of Brunei does not prevent a magistrate's court from altering an "order", though it cannot alter a "judgment".

**[5]** The definition of "judgment" in Ratanlalal and Dhirajlal's Code of Criminal Procedure is accepted, wherein it is stated: "In order to constitute judgment (in the Code) there must be an investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the

entire evidence as in the case of an order of discharge, it will not obviously amount to a judgment". This meant that the magistrate could, by the use of s. 240 of the CPC of Brunei alter or review his earlier order under s. 186 because it was not a "judgment", though he was in error in making his earlier order a conditional one.

**[6]** In view of the above, an order under s. 186 of the CPC of Brunei is not a "judgment". It can therefore be altered under s. 240 of the CPC of Brunei by a magistrate after he has made it. Thus, s. 240 of the CPC of Brunei is available if a magistrate exercises his power under s. 186 to direct a discharge, whether or not this amounts to an acquittal.

**[7]** Even though it may be altered, it is to be noted that such an exercise of power is subject to appeal by either the Public Prosecutor under s. 271 of the CPC of Brunei or by the defendant under s. 272 of the CPC of Brunei. Even though it is not a "judgment", it is an "order" and appealable.

**[8]** The magistrate did not in terms purport to exercise the power conferred by s. 240 of the CPC of Brunei to alter any order which did not qualify as a judgment. This court was nevertheless satisfied that such a power did exist.

*[Earlier order quashed; subsequent order upheld.]*

**Cases referred to:**
*Marzuki Bin Mokhtar v. Public Prosecutor [1981] 2 MLJ 155* ***(refd)***
*Md Razip v. Public Prosecutor [1988] 1 MLJ 84* ***(refd)***
*Re Balasundara Pavalar [1951] AIR Madras 7* ***(refd)***
*State v. Prakash Chandra [1970] AIR Orissa 171* ***(refd)***

**Other sources referred to:**
*Ratanlalal Dhirajlal's Code of Criminal Procedure*, 1987, 13th edn, p 384
*Sohoni's Code of Criminal Procedure*, 1973, 18 edn, p 3611

**Legislation referred to:**
Criminal Procedure Code [Brunei], ss. 186, 240, 271, 272, 279, 285A, 286, 288, 289, 291, 293, 294, 298, 377

*For the Public Prosecutor - Md Yusree Junaidi*
*1st defendant - In person*
*2nd defendant - Absent*
*For the 3rd defendant - Sandhu*
*For the 4th defendant - Zainidi*
*For the 5th defendant - Francis Chiew*

*Reported by Kavitha Gunasegaran*

## JUDGMENT

**Denys Roberts CJ:**

***Background***

At the conclusion of the hearing, I upheld the order made on 27 July 1998 whereby a magistrate had exercised his powers under s. 186 of the Criminal Procedure Code ('CPC') and ordered a discharge of the defendants, the magistrate ordering that such discharge should amount to an acquittal.

I quashed the earlier order (dated 17 June 1998), which he had made under the same section, discharging the defendants, such discharge **not** amounting to an acquittal.

I undertook to deliver reasons for this judgment, in due course, which I now do.

***Section 186 CPC***

This section is in the following terms -

> (1) At any stage of any trial before the delivery of judgment, the officer or other person conducting the prosecution may if he thinks fit inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on such charge against the accused may be stayed by leave of the court or the court may of its own motion stay the proceedings and if so stayed the accused shall be discharged.
>
> (2) Such discharge shall not amount to an acquittal unless the court so directs, except in cases coming under s. 172.
>
> (3) The court may require a person discharged under this section to execute a bond, with or without sureties and during such period as the court may direct, for his reappearance before the court on the same charge and in the meantime to keep the peace and be of good behaviour.

The DPP applied on 17 June for a discharge of all the defendants, such discharge not amounting to an acquittal. The prosecution applied to withdraw all the charges.

The record made by the magistrate on 17 June 1998, states –

> Order defendants be discharged not amounting to an acquittal. For further mention 22 July at 2.00 pm.

Counsel for the third defendant ('D3') submitted that this record is not accurate and that, when making the order, the magistrate said that it was a conditional order, and that this explained why he had arranged for a further mention of the case on 22 July.

On 22 July, the matter was further adjourned to 27 July. On the later date, the DPP informed the magistrate that the prosecution did not intend to proceed with the charge.

Counsel for D3 then applied for all the defendants "to be discharged amounting to an acquittal".

The magistrate thereupon "ordered the defendants to be discharged amounting to an acquittal".

He also said that he would submit the case to the High Court for revision, no doubt because he was unsure that his second order was correct, although in his view justice required that the defendants should be acquitted.

Accordingly, at the instance of the magistrate, I exercised my powers of revision under the CPC and examined the record of the case. I commend the magistrate for referring the matter to me.

***Control Of Prosecutions***

The difficulty faced by the magistrate on the second occasion (ie, 27 July) was that he had already exercised his powers under s. 186 CPC. Could he do this again?

It must be implied that in each case the leave of the court had been given to the exercise of the powers conferred by s. 186.

Assuming that counsel for D3 is correct, and that the first order made by the magistrate was a conditional one, could the magistrate make such an order?

I do not think that he can. If a magistrate exercises his power under s. 186 and discharges, it must be an order made without conditions.

The correct course, in such circumstances, would have been for the magistrate to warn the prosecution that, if it is not ready to proceed on a specified date, the magistrate would direct that there be a discharge amounting to an acquittal on that date, or to order a discharge amounting to an acquittal forthwith.

If a magistrate issued such a warning, it would be open to the public prosecutor to enter a *nolle prosequi*, under s. 377 CPC. This would **not** amount to an acquittal, and would enable the prosecution to pursue the charge at a later date if it wished to do so.

Although the magistrate may have employed the wrong method, it is clear that what he intended to do on the second occasion was to acquit the defendants, having been informed by the prosecution that it did not intend to proceed with the charges. It was then over two months since the defendants' first appearence in court, so that the magistrate's action, after warning, was understandable.

Section 298 CPC confers on a revising judge any of the powers conferred by a number of sections of the CPC, including s. 286 CPC.

Whether or not a stay under s. 186 CPC can be said to be a "judgment" (as to which see below) there can be no doubt in my mind that a stay under s. 186 CPC cannot be made conditional and that the magistrate was in error for so doing. (I am assuming that counsel for D3 was correct, though the record does not show that the earlier order made by the magistrate was a conditional one.)

Leaving aside the question of whether or not the first order of 17 June was conditional, the magistrate made two orders under s. 186, one ordering a discharge not amounting to an acquittal and the other a discharge, which did amount to an acquittal.

Can he properly make two orders, or having made the first, is *functus officio* and therefore cannot make the second?

I am persuaded that he can, provided that the order made by him on 17 June was not a "judgment".

Acting under the powers conferred by s. 286 CPC, however, I am satisfied that I can properly quash the first order and uphold the second, as this is clearly what the magistrate intended.

***Was There A Judgment?***

Can an order under s. 186 CPC can be construed as a "judgment" or not? On this depends the answer to the question of whether he can alter or review it.

Section 240 CPC provides that no court, other than the High Court, shall alter or review a **judgment**, once it has recorded it.

There is no definition of "judgment" in the CPC.

Section 271 CPC allows for appeals by the complainant against any "judgment, sentence or order". The same phrase is used to confer rights on an appellant under s. 272 CPC.

Section 279 CPC empowers a judge to order a stay of execution on any "judgment, order, conviction or sentence". Section 284 CPC refers to "an order of acquittal".

Section 285A CPC deals with appeals as to sentence. By section 286 CPC the High Court is given powers "in an appeal from any other order".

Section 288 CPC obliges the High Court to deliver a "judgment". By section 289 CPC, the High Court must certify its "judgment or order" to the Court in which the "finding, sentence or order appealed against" was recorded.

By s. 291 CPC a "judgment or order" of a magistrate's court is only to be set aside in certain circumstances.

Section 293 CPC refers to the rights of a person "affected by a judgment or order" of a criminal court.

Section 294 CPC uses the phrase "judgment, acquittal, sentence or order" passed by the lower court. Section 296 empowers a judge to satisfy himself, in revision, of any "finding, sentence or order recorded".

Therefore, the CPC contains a number of phrases, listed above, which suggest that a "judgment" is different from an order (see ss. 271, 279, 289, 291, 293, 294).

In the absence of any definition of "judgment", I have to assume that it has a meaning different from an order and that s. 240 CPC does not prevent a magistrate's court from altering "an order", though it cannot alter a "judgment".

What, therefore, is the distinction between the two?

In *Marzuki Bin Mokhtar v. Public Prosecutor* [1981] 2 MLJ 155 Tan Chian Thong J of the Malaysian High Court observed that the word "judgment" was not defined in the Malaysian CPC, which is largely in the same terms at the Brunei CPC.

Thong J noted that Sarkar in his 1973 commentaries on the CPC expressed the opinion at p. 823 that "judgment" in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused. This definition was accepted by the judge.

In the *Marzuki* case, the judge found that a ruling that there was a case to answer was not a judgment, because the latter word indicated, in criminal proceedings, a final order terminating in the conviction or acquittal of the defendant.

In *Md Razip v. Public Prosecutor* [1988] 1 MLJ 84 the Singapore Court of Criminal Appeal held that an order made on a bail application was not a final order resulting in an appeal or acquittal and was therefore not appealable.

The *Md Razip* case, however, would not apply in Brunei, where a defendant may, by s. 272 CPC, appeal against "any judgment, sentence or order". This is in wider terms than the Singapore provision, which limits appeals to the Court of Criminal Appeal.

In *Re Balasundara Pavalar* [1951] AIR Madras 7 a decision of the Madras High Court, the judge concluded that the rejection of a bail application was not a "judgment". In that case the court accepted the view that "judgment" meant a final order in a trial terminating in the conviction or acquittal of the accused.

In *Sohoni's Code of Criminal Procedure*, (1973) 18th Edn, at p. 3611, the author comments that an order made summarily, without consideration of the evidence, as in the case of an order for discharge, is not a judgment.

A final judgment must, he says, be one of conviction or acquittal, because till then there is no final order and the defence of *autrefois acquit* is not available. An order for discharge under s. 186 CPC is therefore not a judgment.

In the *State v. Prakash Chandra* [1970] AIR Orissa 171, Patra J of the Orissa High Court, expressed the opinion that, to constitute a "judgment", the decision of the criminal court must be final. In that case there was an order for the discharge of the defendant, which was not a final order, since there could be a further complaint based on the same facts. He observed –

> A final judgment in a criminal proceeding must necessarily be a judgment of either acquittal or conviction, because till then there is no final order and the defence of autrefois acquit has no application (p. 175) ...
>
> An order for discharge passed in such circumstances is not a decision given on the merits and cannot be called a judgment. Consequently, a Magistrate is not debarred from reviewing it, setting it aside and reviving the old complaint. (p. 176).

In *Ratanlalal and Dhirajlal's Code of Criminal Procedure* (1987) 13th Edn, at p. 384, the authors observe, in commenting upon s. 362 of Indian CPC which dealt with the alteration of review of a "judgment or final order" –

> In order to constitute judgment (in the Code) there must be an investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the entire evidence as in the case of an order of discharge, it will not obviously amount to a judgment.

I accept this definition of "judgment". This means that the magistrate could, by the use of s. 240 CPC alter or review his earlier order under s. 186 because it was not a "judgment", though he was in error in making his first order of 17 June a conditional one.

***Conclusion***

An order under s. 186 CPC is not, on the authorities with which I agree, to be described as a "judgment". It can therefore be altered under s. 240 CPC by a magistrate after he has made it.

Thus s. 240 is available if a magistrate exercises his power under section 186 to direct a discharge, whether or not this amounts to an acquittal.

Even though it may be altered, it is to be noted that such an exercise of power is subject to appeal by either the public prosecutor under s. 271 CPC or by the defendant under s. 272 CPC since, even though it is not a "judgment", it is an "order" and appealable.

The magistrate did not in terms purport to exercise the power conferred by s. 240 CPC to alter any order which did not qualify as a judgment. But I am nevertheless satisfied that such a power did exist.

I therefore quashed his first order under s. 186 CPC and confirmed his second order thereunder, which discharged all the defendants, this amounting to an acquittal of the charge faced by them.